

facturers will be granted immunity for all manner of improper acts. As explained by ORC, violations of the FDCA and FDA regulations are punishable by significant fines, civil penalties, and imprisonment. Similarly, Gile's assertion that preemption will encourage shoddy clinical investigations and development of defective medical devices lacks merit. As shown by the detailed regulations discussed above, it is unlikely that a non-efficacious or unsafe investigational device would survive FDA review.

Moreover, Gile ignores the countervailing public policy of the discovery and development of new products. See 21 U.S.C. § 360j(g) (one purpose of investigational device exemptions is "to maintain optimum freedom for scientific investigators"). As explained by the *Slater* court:

[I]f experimental procedures are subject to hindsight evaluation by juries, so that failed experiments threaten to impose enormous tort liability on the experimenter, there will be fewer experimental treatments, and patients will suffer.

961 F.2d at 1334. Thus, state tort claims run counter to the important public policy, recognized by Congress, of promoting scientific inventions.

Finally, Gile argues that the district court's grant of summary judgment based on federal preemption encompassed both forum and claim preemption, leaving her without a remedy. She contends that public policy disfavors preemption of common law where no remedies are available to consumers injured by the unreasonable conduct of a manufacturer. However, Congress has the power to displace state tort law remedies, and clearly did so by enacting the MDA. See *e.g.*, *Stamps*, 984 F.2d at 1421 (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331, 101 S.Ct. 1124, 1137, 67 L.Ed.2d 258 (1981)). Moreover, Gile is not precluded from asserting a right of redress in the state forum because her claims against her physician are not preempted under the MDA. See *Slater*, 961 F.2d at 1334; *Hunsaker*, 818 F.Supp. at 751. Thus, despite her arguments to the contrary, Gile is not left without a remedy because she may still pur-

sue her claims, if any, against her physician in state court.

V.

There being no genuine issues as to any material facts in this case, the district court committed no error in rendering summary judgment in favor of ORC as a matter of law. Accordingly, the judgment of the district court in favor of Optical Radiation Corporation will be affirmed.



MULTI-CHANNEL TV CABLE COMPANY, d/b/a Adelphia Cable Communications, Plaintiff-Appellee,

v.

CHARLOTTESVILLE QUALITY CABLE OPERATING COMPANY, a Virginia Corporation; Rivanna Partnership, a Virginia general partnership; Alcova Realty & Management Company, Defendants-Appellants,

and

Fountain Court Limited Partnership, a Virginia limited partnership; John A. Schwab, Jr.; Bernard A. Schwab; C. Stuart Raynor, Jr., Interveners.

No. 94-1082.

United States Court of Appeals,
Fourth Circuit.

Argued March 9, 1994.

Decided April 14, 1994.

Cable television provider sought preliminary injunction enjoining competing provider and owners of residential apartment complexes from operating under exclusive cable provider agreements. The United States District Court for the Western District of Virginia, B. Waugh Cigler, United States Magistrate Judge, granted injunction, and

competing provider and owners of apartment complexes appealed. The Court of Appeals, Hamilton, Circuit Judge, held that: (1) portion of preliminary injunction prohibiting owners and property management company from communicating to their tenants any preferences for television cable providers operated as prior restraint of speech in violation of First Amendment and, therefore, would be stricken, and (2) provider was entitled to preliminary injunction.

Affirmed as modified.

1. Telecommunications ¶449.10(2)

Preliminary injunction enjoining cable television provider and owners of four residential apartment complexes from operating under exclusive cable provider agreements properly applied to all four apartment complexes, despite fact that three of the complexes were not named in complaint brought by competing cable provider; the same company managed all four apartment complexes, exclusive cable television provider agreements applied to all four complexes, president and part owner of company which managed complexes was also general partner in the four partnerships which owned the complexes and president and part owner of management company had notice of and attended preliminary injunction hearing. Fed.Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

2. Telecommunications ¶449.10(2)

Cable television provider was entitled to preliminary injunction prohibiting competing provider and owners of residential apartment complexes from operating under exclusive cable provider agreements; provider's monetary damages could not be calculated due to a la carte basis on which provider offered cable services to each tenant, injunction allowed both cable providers to compete in open market on equal terms for it allowed competing provider to arrange nonexclusive agreements with owners of apartment complexes, provider had strong likelihood of succeeding on its conversion claim because equipment comprising cable distribution system, which provider installed in complexes, did not qualify as a fixture so as to belong to owners and because by allowing competitor

to use this equipment, owners seemingly converted provider's property, and public interest favored granting injunction because it would stabilize delivery of cable services.

3. Federal Courts ¶815

Court of Appeals reviews award of preliminary injunctive relief for abuse of discretion.

4. Injunction ¶138.9

Generally, irreparable injury required for preliminary injunction is suffered when monetary damages are difficult to ascertain or are inadequate.

5. Injunction ¶138.6

When record indicates that plaintiff's loss is matter of simple mathematical calculation, plaintiff fails to establish irreparable injury for preliminary injunction purposes.

6. Injunction ¶138.6

When failure to grant preliminary relief creates possibility of permanent loss of customers to competitor or loss of goodwill, irreparable injury prong is satisfied.

7. Federal Courts ¶862

Court of Appeals reviews finding of irreparable harm required for preliminary injunction under clearly erroneous standard.

8. Constitutional Law ¶90.1(1)

Injunctions against pure expressions of opinion infringe upon exercise of First Amendment rights. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ¶90.1(1)

Injunction ¶163(1)

Portion of preliminary injunction prohibiting owners of residential apartment complexes and property management company from expressing preferences for television cable providers to tenants of apartment complexes operated as prior restraint of speech in violation of First Amendment; however, this infirmity did not require dissolution of entire injunction, but rather only vacation of offending portion of the injunction. U.S.C.A. Const.Amend. 1.

10. Fixtures ☞1

Under Virginia law, determining whether particular chattel becomes fixture or remains personalty involves weighing of three factors which are the degree of permanency with which chattels are annexed to realty, adaptation of chattels to use or purpose to which realty is devoted and intention of owner of chattels to make them a permanent accession to the property; of these factors, intention of party making annexation is the paramount and controlling consideration and method or extent of annexation carries little weight except insofar as it relates to nature of article, use to which it is applied and other attending circumstances as indicated in intention of party making annexation.

11. Fixtures ☞5

In determining whether particular chattel becomes fixture or remains personalty under Virginia law, court must determine whether chattel is essential to purpose for which building is used or occupied.

ARGUED: Deborah Colleen Costlow, Winston & Strawn, Washington, DC, for appellants. John Douglas McKay, Barrick & McKay, Charlottesville, VA, for appellee. **ON BRIEF:** Thomas C. Power, Winston & Strawn, Washington, DC, for appellants. Franklyn F. Bergland, David C. Wagoner, Barrick & McKay, Charlottesville, VA; Philip J. Kantor, Bienstock & Clark, Miami, FL; Randall D. Fisher, John B. Glicksman, Adelphia Cable Communications, Couderport, PA, for appellee.

Before WILKINSON, HAMILTON, and MICHAEL, Circuit Judges.

Affirmed as modified by published opinion. Judge HAMILTON wrote the opinion, in which Judge WILKINSON and Judge MICHAEL joined.

1. The Appellants include Charlottesville Quality Cable Operating Co. (CQC), Alcova Realty and Management Co. (Alcova), Rivanna Partnership (Rivanna Pa.), Fountain Court Limited Partnership (Fountain Court), John A. Schwab, Jr., Bernard A. Schwab, and C. Stuart Raynor.

OPINION

HAMILTON, Circuit Judge:

This appeal challenges the propriety of a preliminary injunction which prohibits the Appellants—a cable television provider and four residential apartment complexes—from operating under cable provider agreements to the exclusion of a competing cable provider—Multi-Channel TV Cable Co., d/b/a Adelphia Cable Communications (Adelphia).¹ For the reasons stated herein, we affirm the preliminary injunction as modified.

I

Adelphia and CQC are competing cable television providers in Charlottesville, Virginia. In 1981, Adelphia installed a cable distribution system in three multi-dwelling units (MDUs) in Charlottesville at the request of the MDU owners.² Adelphia installed these systems at its own expense. These distribution systems, known as "home run" systems, allowed Adelphia to provide cable television service to those individual tenants desiring such service. The home run system eliminated the previous "bulk service" in which the landlords subscribed to the cable television services in bulk, paid Adelphia one monthly fee, and provided cable television as part of its lease obligations to the tenants. After installation of the home run system, each tenant within the MDUs had the capacity to negotiate individual contracts with Adelphia for the provision of cable television, without any involvement by the MDU owners or the landlord. Adelphia maintained its home run systems at these MDUs at its own expense.

In 1990, Adelphia installed its home run system in another MDU in Charlottesville, Rivanna Terrace. Unlike the prior installations, the installation at Rivanna Terrace was a "pre-wire" project, meaning that Adelphia installed the system during construction of this MDU. Adelphia installed its system at the request of Beacon Construction Co., the

2. The MDUs were: Inglewood Square, Park Lane and Fountain Court.

general contractor in charge of building Rivanna Terrace, who served as agent for the MDU owner, Rivanna Pa., for purposes of procuring cable television equipment. Although a subcontractor actually installed the wiring within the walls, Adelphia provided the wiring free of charge. Following this installation, Rivanna Pa. allowed Adelphia to enter the complex and install its wall plates and other equipment necessary to complete the home run system and thereby provide cable service to tenants. Adelphia installed this equipment and subsequently maintained the entire cable system at its own expense. In the summer of 1993, Adelphia began offering cable service to the tenants within the four MDUs on an *a la carte* basis. The *a la carte* service allowed each tenant to customize the package of cable program services that he or she received.

In November 1993, the property manager for these four MDUs, Alcova, executed an exclusive cable television provider agreement with CQC. This agreement gave CQC the exclusive right to provide cable television services to the tenants within the four MDUs. The agreement allowed CQC to install its cable distribution equipment at the MDUs and provided that "[t]itle to and in the Equipment shall, at all times, remain with [CQC] . . . , and no portion of the Equipment will be deemed a fixture of the Properties notwithstanding any affixation to the Properties." (J.A. 408). The agreement also provided that CQC would pay Alcova a "consultant fee" in exchange for "advice in connection with establishing and maintaining optimal service at your units." (J.A. 406). The "consultant fee" equalled twelve percent of CQC's cable service revenues from the tenants within each MDU. Alcova signed the written agreement as "agent" for the MDU owners, and the writing identified the rights and obligations of the MDU owners, rather than Alcova.

After executing this agreement, CQC began installing its cable distribution system at the four MDUs. CQC's cable distribution

system uses a microwave transmitter to transmit its signal from a central transmitting location to its subscribers, who receive the signal via special microwave antennas. Providing service to the MDUs under CQC's system requires both a central reception antenna at each MDU, as well as a cable distribution system, such as that installed by Adelphia, to carry the signal from the central reception point to each subscriber's television. Thus, to install the distribution system, CQC erected its microwave antennas at each MDU and connected the antenna to Adelphia's existing distribution system leading to the individual apartments.³

CQC's actions abruptly terminated Adelphia's service to its subscribers within the MDUs without the prior consent of either the tenants or Adelphia. Thereafter, Adelphia filed suit in the United States District Court for the Western District of Virginia. The complaint named CQC, Alcova, and Rivanna Pa. as defendants and alleged various claims, including: interference with an easement or irrevocable license; conversion of Adelphia's cable distribution system; tortious interference with Adelphia's contractual relationships; common law and statutory conspiracy; and a violation of the Virginia Residential Landlord and Tenant Act, Va.Code Ann. § 55-248.2, *et seq.* The complaint did not name the other three MDUs or their owners.

On December 3, 1993, Adelphia filed a motion requesting a preliminary injunction to prohibit the named defendants from operating under the exclusive provider agreement and to allow Adelphia to continue providing cable service to the MDU tenants pending the litigation. On December 7, 1993, Adelphia served an amended notice of hearing on its motion for preliminary injunction. In this notice, Adelphia indicated that it intended to move for a preliminary injunction against Rivanna Terrace, as well as the other three MDUs under the common management of Alcova.

3. When Adelphia's employees conducted a routine inspection of its distribution system at the MDUs, they discovered that the padlocks on its distribution boxes had been cut and the front panels of some of the boxes were missing. In-

side the boxes, Adelphia's cables had been cut at the connectors. The cables from the distribution boxes leading into the individual apartments had been removed and inserted into CQC's boxes, which had been placed beside Adelphia's boxes.

On December 15, 1993, a magistrate judge conducted a hearing on Adelphia's motion for preliminary relief with the consent of the parties. 28 U.S.C. § 636(c). John A Schwab, Jr., the president and part owner of Alcova and a general partner in the four partnerships owning the four MDUs, attended the hearing and testified on behalf of the Appellants. At the conclusion of this hearing, the magistrate judge concluded that preliminary relief was appropriate. In reaching this conclusion, the magistrate judge found that, under the facts as currently developed, Adelphia established a strong likelihood of succeeding on the merits of some of its claims, reasoning that: (1) the "consultant fee" under the exclusive provider agreement amounted to an illegal kickback in violation of the Virginia Landlord Tenant Act; (2) the exclusive provider agreement and the subsequent interruption of Adelphia's service to the tenants of the MDUs amounted to tortious interference with Adelphia's contractual relations; (3) CQC's use of Adelphia's distribution system within the MDUs constituted conversion of Adelphia's equipment; and (4) the Appellants' actions supported a claim for both statutory and common law conspiracy. With respect to the tortious interference claim, the magistrate judge opined that, by allowing Adelphia to negotiate cable service contracts directly with the individual tenants of the MDUs, the MDU owners "gave [Adelphia] a business expectancy with those tenants" for the duration of the tenants' leases at the respective MDUs. (J.A. 335).

The magistrate judge also found that, without a preliminary injunction, Adelphia would suffer irreparable harm. The magistrate judge reasoned that, without the preliminary injunction, "the damages suffered by [Adelphia] are incapable of calculation, not simply difficult to calculate, because the service to customers varied." (J.A. 380). In other words, because Adelphia allowed each tenant to fashion the type of cable service desired, *i.e.*, *a la carte* service, the magistrate judge found that Adelphia's damages would be incalculable because "there is no way of determining what menu services will

satisfy the appetite of any particular subscriber whose appetite even may change during the subscription period." *Id.* The magistrate judge also found that Adelphia would suffer a loss of goodwill from its customers absent the preliminary injunction.

The magistrate judge then concluded that the potential irreparable harm to Adelphia outweighed the harm to the Appellants resulting from the preliminary relief. The magistrate judge reasoned that, by only preventing the Appellants from operating under the exclusive provider agreements, the preliminary injunction allowed CQC and Adelphia to compete for tenants within the MDUs on equal terms. Finally, the magistrate judge found that the public interest favored granting a preliminary injunction since the injunction would "stabilize" the delivery of cable services. (J.A. 382).

On December 16, 1993, the magistrate judge entered a preliminary injunction conditioned on Adelphia's payment of a \$20,000 bond. The preliminary injunction prohibited the Appellants from operating under the exclusive provider agreements and prohibited the MDU owners or Alcova from expressing any preference for cable providers to the MDU tenants. The preliminary injunction also allowed Adelphia to reconnect its cable service to those tenants whose leases had not expired by December 13, 1993 and who desired reconnection. Finally, the preliminary injunction provided that, if some tenants wished to receive cable services from CQC, CQC could not utilize "any equipment, wiring or hardware belonging to or claimed to be the property of [Adelphia]." (J.A. 385).

The Appellants filed a timely notice of appeal.

II

[1] The Appellants first raise several prefatory challenges, only one of which warrants discussion. Specifically, the Appellants claim the preliminary injunction is invalid because it applies to MDU owners not named in Adelphia's complaint.⁴ Because the com-

4. The preliminary injunction enjoined the exclusive provider agreements at Inglewood Square, Parklane, and Fountain Court, in addition to

Rivanna Terrace. Adelphia's complaint did not name the first three MDUs or their owners.

plaint only named Rivanna Terrace, its owners and Alcova, but not the other three MDUs or their owners, the Appellants conclude that the preliminary injunction must be vacated as to the other three MDU owners. We disagree.

Fed.R.Civ.P. 65(d) provides that an injunction shall be binding upon "the parties to the action, their officers, agents . . . and upon those persons in active concert or participation with them who receive actual notice of the order" In the present case, the record contains sufficient evidence to suggest that the other three MDU owners acted in "active concert or participation with" Alcova and Rivanna Pa. For example, Alcova managed all four MDUs affected by the preliminary injunction and the exclusive provider agreement applied to all four MDUs. Moreover, the record indicates that the president and part owner of Alcova, John A. Schwab, Jr., is also a general partner in the four partnerships which own the four MDUs. (J.A. 177-78). Such evidence suggests that all four MDU owners and Alcova acted in "active concert" in arranging the exclusive provider agreements with CQC. This, coupled with the fact that John A. Schwab had notice of, and attended the preliminary injunction hearing, compels us to conclude that, under Rule 65(d), the preliminary injunction properly applies to all four MDUs and their owners.

III

[2] The Appellants next launch a frontal assault on the award of preliminary relief. Specifically, the Appellants claim that the magistrate judge erred in finding that: (1) Adelphia would suffer irreparable harm absent a preliminary injunction; (2) Adelphia's irreparable harm absent the preliminary injunction outweighed the harm to the Appellants if the injunction were granted; (3) Adelphia had a strong likelihood of success on the merits; and (4) the public interest favored granting the preliminary injunction. Because of these erroneous findings, the Appellants conclude that the preliminary injunction cannot withstand scrutiny. We disagree and discuss our reasons with respect to each argument separately.

A

[3] The requirements for granting preliminary relief are well known. In *Direx Isreal, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir.1991), we outlined the precise analytical framework which courts must employ in determining whether to grant preliminary relief. First, the party requesting preliminary relief must make a "clear showing" that he will suffer irreparable harm if the court denies his request. *Id.* at 812-13. Second, if the party establishes irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." *Direx Israel*, 952 F.2d at 812. Third, if the balance tips decidedly in favor of the party requesting preliminary relief, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Id.* at 813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." *Id.* Fourth, the court must evaluate whether the public interest favors granting preliminary relief. We review the award of preliminary relief for an abuse of discretion. *Id.* at 811.

B

Appellants first claim the magistrate judge erroneously found that Adelphia would suffer irreparable harm absent the preliminary injunction. The Appellants reason that, because Adelphia's average revenue from the four MDUs in question provides an adequate basis for determining any lost revenue from the exclusive provider agreements, Adelphia would not suffer irreparable harm without the preliminary injunction. We disagree.

[4-7] Generally, "irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate." *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir.1973). Thus, when "the record indicates

that [plaintiff's loss] is a matter of simple mathematic calculation," a plaintiff fails to establish irreparable injury for preliminary injunction purposes. *Graham v. Triangle Pub.*, 344 F.2d 775, 776 (3d Cir.1965). However, when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied. *Merrill Lynch, Pierce, Fenner and Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir.1985). We review a finding of irreparable harm under the clearly erroneous standard. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir.1991).

In the present case, the magistrate judge found that Adelphia would suffer irreparable harm absent the preliminary injunction because its monetary damages could not be calculated due to the *a la carte* basis on which Adelphia offered cable services to each MDU tenant. The magistrate judge also found that, absent the preliminary injunction, Adelphia would be irreparably harmed by the loss of goodwill. Our review of the record reveals that these findings are not clearly erroneous.

Contrary to Appellants' assertion, the historical average of Adelphia's revenue does not provide an adequate basis for measuring the potential loss of revenue because Adelphia only began providing *a la carte* service in the summer of 1993. The relative novelty of such service clearly makes any calculation of Adelphia's damages "difficult to ascertain" and, therefore, supports a finding that Adelphia would suffer irreparable harm. *Danielson*, 479 F.2d at 1037. See also *Blackwelder Furn. Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 197 (4th Cir.1977) ("Irreparability of harm includes the impossibility of ascertaining *with any accuracy* the extent of the loss.") (emphasis added, citation omitted). Moreover, the threat of a permanent loss of customers and the potential loss of goodwill also support a finding of irreparable harm. *Id.* Thus, we conclude that the magistrate judge did not clearly err in finding that Adelphia would suffer irreparable harm absent the preliminary injunction.

C

Because Adelphia adequately established irreparable harm, "the next step then for the court to take is to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." *Direx Israel*, 952 F.2d at 812. The Appellants identify three types of harm resulting from the preliminary relief, arguing that these harms outweigh the irreparable harm to Adelphia.

[8, 9] The Appellants first suggest that the part of the preliminary injunction prohibiting Alcova and the MDU owners from "communicating to its tenants any preferences of cable providers," operates as a prior restraint of speech in violation of the First Amendment. We agree. Injunctions against "pure expressions of opinion . . . infringe upon the exercise of First Amendment rights." *Consolidation Coal Co. v. Disabled Miners*, 442 F.2d 1261, 1267 (4th Cir.), cert. denied, 404 U.S. 911, 92 S.Ct. 228, 30 L.Ed.2d 184 (1971). The challenged portion of the preliminary injunction in the present case improperly "restrains [Alcova and the MDU owners] from publicizing their grievances" as well as their opinions. *Id.*

Fortunately, this infirmity does not require dissolution of the entire injunction. Instead, we need only vacate that portion of the injunction which offends the First Amendment. *Id.* Accordingly, we hereby vacate that part of the injunction prohibiting the MDU owners and Alcova from expressing preferences for cable providers to the MDU tenants. By vacating this portion of the preliminary injunction, we also eliminate the perceived harm identified by the Appellants.

The Appellants next suggest that the preliminary relief, prohibiting CQC from entering into exclusive provider agreements, deprives CQC of potential revenue. Because the magistrate judge found the potential loss of revenue would irreparably harm Adelphia, Appellants suggest that the potential harm to CQC at least equals Adelphia's. We disagree. The preliminary injunction allows CQC to arrange *nonexclusive* agreements with MDU owners. Thus, the preliminary

injunction allows CQC and Adelphia to compete in an open market on equal terms. Accordingly, the perceived harm to CQC does not exist.

Finally, the Appellants suggest that, by allowing Adelphia continued access to the wiring within the relevant properties, the preliminary injunction deprives the property owners of their inherent right to exclude others from their property. We believe this perceived harm does not invalidate the magistrate judge's conclusion that the potential irreparable harm to Adelphia outweighs the perceived harm to Appellants. Although the injunction may impose a minimal inconvenience on Appellants in the use of a property right, at best this amounts to only a minor intrusion, insignificant in comparison to the potentially irreparable harm to Adelphia.

D

Because the balance of harms tips decidedly in favor of Adelphia, preliminary relief is appropriate if Adelphia "has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Direx Israel*, 952 F.2d at 813. We conclude that Adelphia satisfied this requirement with respect to its claim for conversion.⁵

The Appellants contend that they did not convert Adelphia's cable distribution equipment within the MDUs, reasoning that the equipment became a fixture within each MDU and, therefore, belonged to the MDU owners. Because Adelphia had no legal title to this equipment, the Appellants conclude that the conversion claim fails as a matter of law. We disagree.

5. We also believe that Adelphia was likely to succeed on its claim that the exclusive provider agreement violated the Virginia Landlord-Tenant Act. This Act proscribes payments by cable providers to landlords "in exchange for giving tenants ... access to [cable] service." Va. Code § 55-248.13:2. The exclusive provider agreement, under which CQC paid the property manager of the MDUs a "consultant fee," violates this Act because the payments were *tantamount* to payments to the MDU owners in exchange for giving CQC access to the MDUs. As previously discussed, John Schwab, Jr., the president and part owner of the property manager for the

[10] Under Virginia law, determining whether a particular chattel becomes a fixture or remains personalty involves the weighing of three factors. These factors are:

- (1) the degree of permanency with which the chattels are annexed to the realty; (2) the adaptation of the chattels to the use or purpose to which the realty is devoted; and (3) the intention of the owner of the chattels to make them a permanent accession to the [property].

Lamar Corp. v. City of Richmond, 241 Va. 346, 402 S.E.2d 31, 34 (1991) (citing *Danville Holding Corp. v. Clement*, 178 Va. 223, 16 S.E.2d 345, 349 (1941)). Of these factors, "the intention of the party making the annexation is the paramount and controlling consideration." *Danville*, 16 S.E.2d at 349. Moreover, "the method or extent of the annexation carries little weight, except insofar as they relate to the nature of the article, the use to which it is applied and other attending circumstances as indicated in the intention of the party making the annexation." *Id.*

In the present case, the parties dispute whether the cable wiring may be extracted without inflicting substantial damage upon the property. However, because this factor only serves to identify the intent of Adelphia and otherwise "carries little weight," *id.*, we need not resolve this factual dispute. The other two tests clearly suggest that Adelphia intended to retain ownership of the equipment.

[11] Under the second factor, a court must determine whether "the chattel is essential to the purpose for which the building is used or occupied...." *Danville*, 16 S.E.2d at 349. In the present case, the cable

MDUs (Alcova), was also a general partner in the partnerships which owned all four MDUs. Moreover, the agreement continuously refers to the "owner" of the properties, and describes Alcova as an "agent" for the owners. Also, the "consultant fee" was based on the revenues from tenant cable subscriptions within the MDUs, thereby effectively compensating the MDU owners for allowing cable access to their buildings.

Because we conclude that Adelphia is likely to succeed on at least two of its claims, we need not address the remaining two claims considered by the magistrate judge: conspiracy and tortious interference with business relations.

distribution systems were not "placed in the building ... to carry out the very purpose for which the building[s][were] acquired, adopted, occupied and used." *Id.* In other words, the cable distribution systems, while beneficial to the MDUs, were not essential for the MDUs' primary purpose, housing tenants. Because the cable distribution systems are not necessary to effectuate the MDUs' primary purpose, the adaptation factor suggests that this chattel remained personalty, i.e., belonging to Adelphia.

The third factor also favors Adelphia. Specifically, the facts suggest that Adelphia, the original owner of the chattels, intended to retain ownership of that property. For example, Adelphia either installed or provided the interior wiring for the distribution system at its own expense, as well as the wall plates and other equipment necessary to bring the system "on line." Also, since the time of installation, Adelphia has continuously maintained the equipment at its own expense. These factors clearly support the finding that Adelphia intended to retain possession.⁶

Thus, we conclude that the record, in its current state, suggests that the equipment comprising the cable distribution system does not qualify as a fixture and, therefore, does not belong to the MDU owners. Thus, by allowing Adelphia's competitor, CQC, to use this equipment, the MDU owners seemingly converted Adelphia's property. Accordingly, under the facts as currently developed, Adelphia established a strong likelihood of succeeding on its conversion claim.⁷

E

Finally, the Appellants challenge the magistrate judge's finding that the public interest favored granting the preliminary injunction. The magistrate judge found that the public interest favored granting a preliminary in-

6. Though not dispositive, we also find persuasive support for this conclusion from the exclusive provider agreement between CQC and Alcova. That agreement specifically noted that none of CQC's equipment could be considered a fixture and CQC retained title to all such equipment installed at the MDUs.

junction because the injunction would "stabilize" the delivery of cable services. Our review of the record suggests that this finding was not clearly erroneous.

IV

For the reasons stated herein, we affirm the preliminary injunction as modified. The modification reflects our decision to vacate that part of the preliminary injunction prohibiting the MDU owners and Alcova from communicating to the MDU tenants any preference for cable providers.

AFFIRMED AS MODIFIED.



**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Edward Dane JEFFUS, Defendant-
Appellant.**

No. 93-5126.

**United States Court of Appeals,
Fourth Circuit.**

Argued Feb. 11, 1994.

Decided April 22, 1994.

Defendant pled guilty in the United States District Court for the Middle District of North Carolina, N. Carlton Tilley, Jr., J., to drug charges, and he appealed. The Court of Appeals, Niemeyer, Circuit Judge, held that: (1) stop of defendant's vehicle was justified, and (2) officer's conduct in having trained dog sniff perimeter of defendant's

7. Because we base our conclusions on a record which may be further developed in a trial on the merits, "[w]e are quick to note that the status imposed by the preliminary injunction is not permanent and does not determine the outcome on the merits. Those issues await trial and findings by the district court." *Faulkner v. Jones*, 10 F.3d 226, 234 (4th Cir.1993).

FILE COPY

NO. 96-555,303

**COX COMMUNICATIONS
WEST TEXAS, INC.,
Plaintiff**

VS.

**HEARTLAND WIRELESS -
LUBBOCK, INC., HENRY HOLMES
AND MEDLOCK SOUTHWEST
MANAGEMENT CORPORATION,
Defendants**

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IN THE 99TH DISTRICT COURT

OF

LUBBOCK COUNTY, TEXAS

FILED
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DISTRICT COURT
BY

TEMPORARY INJUNCTION

On April 15, 1996, came on for consideration the Application of COX COMMUNICATIONS WEST TEXAS, INC. ("Cox") as Plaintiff for a Temporary Injunction upon its verified Petition after due notice to Defendants HEARTLAND WIRELESS - LUBBOCK, INC. ("HLWC") and MEDLOCK SOUTHWEST MANAGEMENT CORPORATION, as required by law. Cox and Defendants HLWC and MEDLOCK SOUTHWEST MANAGEMENT CORPORATION appeared in person and by their attorneys of record. Defendant HENRY HOLMES is deceased, and his estate was not properly noticed of the hearing and did not formerly appear though attorney Billy R. Wolfe appeared and observed the proceedings. The court, having heard the evidence and arguments of Counsel, finds that Cox is entitled to injunctive relief; that Cox is engaged in the distribution of cable service and has a franchise to service the City of Lubbock, Texas; that Cox purchased and initially installed all of the drop coaxial cable and other necessary equipment for the provision and providing of cable service to the tenants of certain apartment complexes owned and operated by MEDLOCK SOUTHWEST

MANAGEMENT CORPORATION and other apartment complexes similarly situated; that the coaxial cable within the apartments has not become a fixture and in fact remains the property of and belongs to Cox; that the loss of the drop coaxial cable system in place in the apartment complexes will constitute irreparable harm to Cox; that unless Defendants HLWC and MEDLOCK SOUTHWEST MANAGEMENT CORPORATION are enjoined, due to the difficulty in calculating damages, Cox will suffer irreparable harm, damage and injury for which there is no adequate remedy at law; that injunctive relief is appropriate in the premises to place Cox in what the Court feels is the last actual peaceable and uncontested status before the opening and tampering with of the lock boxes at the various apartment complexes by HLWC; that Cox has stated a recognizable cause of action and demonstrated sufficiently that it has a probable right of recovery upon final trial on the merits of this matter; and that Cox is entitled to a Temporary Injunction, as granted in this Order, consistent with its prayer for same and the Temporary Restraining Order heretofore issued by the Court. Accordingly, the Court hereby issues the following Orders.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Temporary Injunction requested be and is granted as requested with respect to Defendants HLWC and MEDLOCK SOUTHWEST MANAGEMENT CORPORATION, and that the Clerk of this Court issue a Writ of Injunction, pending final hearing and determination of this cause, restraining and enjoining said Defendants HLWC and MEDLOCK

SOUTHWEST MANAGEMENT CORPORATION, along with their partners, subsidiaries, affiliates, officers, agents, representatives, servants, employees, attorneys and all persons in active concert and participation with them from:

(a) denying Cox access to the LaPlace I, LaPlace II and Casa Orlando Apartments and other apartment complexes similarly situated in Lubbock, Lubbock County, Texas;

(b) interfering with Cox's operation and maintenance of its drop cable system at the LaPlace I, LaPlace II and Casa Orlando Apartments and other apartment complexes similarly situated in Lubbock, Lubbock County, Texas for the purpose of providing cable service to the tenants;

(c) interfering with Cox's maintenance and solicitation of customers to its cable service at the LaPlace I, LaPlace II and Casa Orlando Apartments and other apartment complexes similarly situated in Lubbock, Lubbock County, Texas;

(d) using, tampering with or making connections to Cox's cable television equipment and coaxial cables in Lubbock County, Texas without authorization from Cox;

(e) assisting, aiding, abetting or conspiring with and permitting and acquiescing in the use of, tampering with and making connections to Cox's cable television equipment and coaxial cable in Lubbock County, Texas without authorization from Cox;

(f) interrupting the receipt of Cox's cable service by any tenant who has paid for said service directly to Cox in Lubbock County, Texas;

(g) imposing a penalty of any kind upon any tenant who was required to switch from receiving Cox's cable service to HLWC's service, who desires to switch back to the receiving of Cox's cable service;

(h) allowing any other provider of cable service, including but not limited to HLWC, other franchise cable operators, MATV Companies and HLWC itself to utilize, tamper with or disconnect Cox's drop cable system at the LaPlace I, LaPlace II and Casa Orlando Apartments.

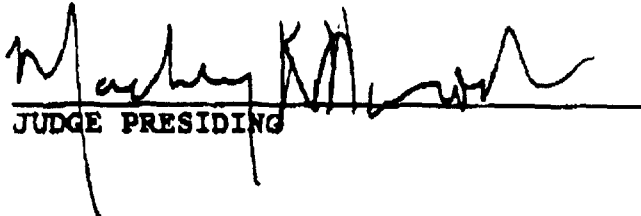
IT IS FURTHER ORDERED that Plaintiff must, prior to the

issuance of such Temporary Injunction, file with the Clerk of this Court a good and sufficient Bond conforming thereto and condition according to law and approved by the Clerk in the amount of FIVE THOUSAND DOLLARS (\$5,000.00).

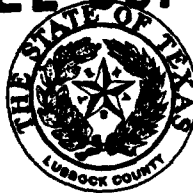
IT IS FURTHER ORDERED that trial on the merits of this action is set for July 22, 1996, at 9:00 o'clock a.
m. on the civil jury docket

On the filing and approval of the Bond described above, the Clerk of this Court is directed to issue temporary injunction that conforms with this order and all legal requirements.

SIGNED this 24th day of April, 1996.


JUDGE PRESIDING

FILE COPY



MACKEY K. HANCOCK
DISTRICT JUDGE

STATE OF TEXAS
99TH JUDICIAL DISTRICT OF TEXAS
(LUBBOCK COUNTY COURTHOUSE - THIRD FLOOR)
P.O. Box 10636
LUBBOCK, TEXAS 79408
(806) 767-1018

DEBI PETTIE
OFFICIAL COURT REPORTER

April 19, 1996

Mr. Philip J. Kantor
Bienstock & Clark
First Union Financial Center
200 S. Biscayne Boulevard, Suite 3160
Miami, FL 33131-1100

Mr. Roger P. Furey
Arter & Hadden
1801 K Street, N.W., Suite 400K
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Mr. Robert W. St. Clair
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University Plaza Building
1901 University, Suite 500
P.O. Box 5950
Lubbock, Texas 79408

Mr. Jack P. Martin
Law Offices of Jack P. Martin
2508 Auburn
Lubbock, Texas 79408

Re: Cause No. 96-555,303; Cox Communications West Texas, Inc. vs. Heartland Wireless-Lubbock, Inc. and Medlock Southwest Management Corporation.

Dear Counsel:

First let me say that I appreciate all the effort that went into the preparation of the trial briefs. I found that the materials provided definitely assisted the Court in arriving at its decision.

The Court is going to issue the temporary injunction on behalf of Cox Communications. The injunction will issue to place Cox Communication in what the Court feels is the last actual peaceable, uncontested status. The Court is of the opinion that said status was that of the parties before the opening of the Cox Communication lock boxes by Heartland. The issuance of the temporary injunction will be conditioned upon the execution of a good and sufficient bond by Cox Communication in the amount of \$5,000.00.

By this order the Court is specifically finding that Cox Communication has stated recognizable cause of action and demonstrated sufficiently that it has a probable right of recovery

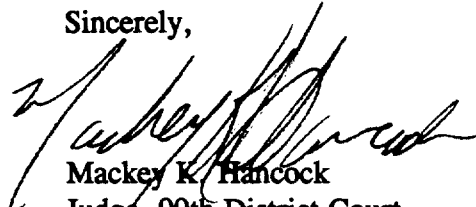
Page Two

Re: Cause No. 96-555,303

upon final trial on the merits in this matter. The Court has reviewed the evidence and the law as submitted by counsel and determined that Cox Communications will suffer imminent and irreparable harm if this injunction is not granted. The Court is of the opinion that the loss of the drop cable system in place in the apartment complexes in question will constitute irreparable harm. Finally, as was implied by the forgoing sentence, the Court finds that the coaxial cable within the apartments themselves has not become a fixture and belongs to Cox Communications. Based upon that finding and the testimony about the difficulty in calculating damages, the Court finds that Cox Communications has no adequate remedy at law.

The attorneys for Cox Communication will prepare the order for the Court's signature. Since I will be out of the country next week, I have left a copy of this letter with Judge Brad Underwood and he has been requested to sign the injunction under the provisions of Rule 330. Please present the same to him for signature.

Sincerely,



Mackey R. Hancock
Judge, 99th District Court
Lubbock County, Texas

MKH/jbw

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2 ROBERT D. GOLDBERG, ESQ. (California Bar #137356)
3 BIENSTOCK & CLARK
4 3340 Ocean Park Boulevard, Suite 3075
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7 TERRY S. BIENSTOCK, ESQ. (Florida Bar #259160)
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10 Miami, Florida, 33131
11 Telephone No.: (305) 373-1100

12 Attorneys for Plaintiff

ORIGINAL FILED

NOV 22 1996

LOS ANGELES
SUPERIOR COURT

NOV 22 1996

13 SUPERIOR COURT OF THE STATE CALIFORNIA

14 FOR THE COUNTY OF LOS ANGELES - NORTHWEST DISTRICT

15 TCI of EAST SAN FERNANDO VALLEY,)
16 L.P., a Colorado limited)
17 partnership,)

18 Plaintiff,)

19 v.)

20 OPTEL, INC., a Delaware)
21 corporation, CENTURY QUALITY)
22 MANAGEMENT, INC., a California)
23 corporation, SAM MENLO, an)
24 individual, doing business as)
25 MENLO ENTERPRISES, and DOES 1)
26 through 50, inclusive,)

27 Defendants.)
28

CASE NO.: LC 038466

ORDER GRANTING PRELIMINARY
INJUNCTION

BIENSTOCK & CLARK

ATTORNEYS AT LAW

3340 OCEAN PARK BOULEVARD, SUITE 3075

SANTA MONICA, CALIFORNIA 90405

(310) 314-8660

1 This matter came regularly before the court by way of the
2 order to show cause why a preliminary injunction should not be
3 issued on October 3, 1996, October 31, 1996 and November 18, 1996.
4 Oral argument was heard on October 3, 1996 and November 18, 1996.
5 Alexander Wiles and Craig Varnen appeared for defendant OpTel,
6 Inc. on each of these dates. Defendant Sam Menlo and Century
7 Quality Management, Inc. appeared through counsel Abraham Coleman
8 on October 31, 1996 and November 18, 1996, but made no appearance
9 on October 3, 1996. Because defendant Sam Menlo and Century
10 Quality Management, Inc. did not file a written opposition, these
11 defendants did not have standing to address the court on oral
12 argument on November 18, 1996. Roger Clark and Robert Goldberg,
13 counsel for plaintiff TCI of East San Fernando Valley, LP.
14 appeared on each of the above dates.

15
16 The court has reviewed all of the papers and declarations
17 submitted in support of and in opposition to the order to show
18 cause. The court finds, based upon the evidence identified below,
19 that plaintiff is likely to suffer greater injury from the denial
20 of the injunction than defendants are likely to suffer if it is
21 granted, and that plaintiff has a reasonable probability that it
22 will prevail on the merits, and that plaintiff will suffer
23 irreparable harm if injunctive relief is not granted.

24
25 Based upon the verified complaint on file herein and on the
26 declarations of Kurt Taylor, Richard Shiba, Jerry Johnson, Thomas
27 Horne, William R. Cullen, Michael Burke, Edward W. Beyer, Joseph
28 Bonica, Heidi H. Mayen, Hamideh Najivzadeh, Edward L. Gordon and

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1 Robert D. Goldberg, supplemental declarations of Kurt Taylor and
2 Jerry Johnson, supporting papers and oral argument of counsel,
3

4 IT IS HEREBY ORDERED that defendants OpTel, Inc., San Menlo
5 and Century Quality Management, Inc. and, their officers, agents,
6 servants, employees, representatives, assigns and all persons
7 acting in concert or cooperation with them are restrained and
8 enjoined and commanded to desist, pending trial of this action,
9 from doing or attempting to do, or causing to be done, directly or
10 indirectly, by any means, methods or devices whatsoever, or by any
11 person or persons whomsoever, either or any or all of the
12 following acts:
13

14 (a) Denying TCI of EAST SAN FERNANDO VALLEY, L.P., a
15 Colorado limited partnership ("TCI") access to the El
16 Conquistador Apartments located at 15005 Sherman Way in
17 the City of Van Nuys, California ("El Conquistador
18 Apartments") for the purpose of operating and
19 maintaining its cable system and solicitation of
20 residents of the El Conquistador Apartments for cable
21 services;
22

23 (b) Interfering with TCI's operation and maintenance of its
24 internal distribution system at the El Conquistador
25 Apartments for the purpose of providing cable service
26 to the tenants;
27
28

1 (c) Interfering with TCI's maintenance of its customers and
2 solicitation of residents for its cable service at the
3 El Conquistador Apartments;

4
5 (d) Using, tampering with or making connections to TCI's
6 cable television equipment and coaxial cables at the El
7 Conquistador Apartments without authorization from TCI;

8
9 (e) Interrupting any tenant from receiving TCI's cable
10 service paid directly by the tenant to TCI at the El
11 Conquistador Apartments;

12
13 (f) Interfering with the ability of any resident of the
14 Apartments from receiving cable television service from
15 TCI; and

16
17 (g) As to Sam Menlo and Century Quality Management, Inc.
18 only, allowing any other provider of cable service,
19 including but not limited to Optel, Inc., other
20 franchise cable operators, and MATV companies to
21 utilize, tamper with or disconnect TCI's internal
22 distribution system at the El Conquistador Apartments.

23
24 Nothing in this order shall prevent Optel, Inc. from
25 entering the El Conquistador Apartments for the purpose of
26 removing equipment that it had previously installed, both active
27 and passive. In removing its equipment, Optel, Inc. shall use all
28 reasonable care not to damage, remove or relocate TCI's wiring and

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1 equipment, or impair the ability of TCI to reconnect its cable
2 system at the El Conquistador Apartments. For example, at each
3 junction box, OpTel, Inc. shall leave sufficient excess wiring to
4 allow prompt reconnection of TCI's cable system, and shall not cut
5 the wires short which would impair TCI's reconnection of its cable
6 system at the El Conquistador Apartments.
7

8 OpTel, Inc shall not remove, relocate or damage any drop
9 wires, interconnection cables or junction boxes at the El
10 Conquistador Apartments.
11

12 This preliminary injunction order is effective immediately.
13

14 DATED: November 28, 1996.
15

16 LEON KAPLAN
17

18 LEON KAPLAN
19 LOS ANGELES SUPERIOR COURT JUDGE
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3340 Ocean Park Boulevard, Suite 3075
Santa Monica, California 90405
(310) 314-9000

PROOF OF SERVICE - BY FAX & U.S. MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is that of Bienstock & Clark, located at 3340 Ocean Park Boulevard, Suite 3075, Santa Monica, California 90405.

On NOVEMBER 22, 1996, I served the foregoing document described as: (Proposed) ORDER GRANTING PRELIMINARY INJUNCTION; on the interested parties in this action by sending via facsimile and by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE Attached "Service List"

X (BY ELECTRONIC TRANSMISSION-VIA FACSIMILE) I caused all of the pages of the above-entitled document to be sent to the indicated recipient(s) noted on the attached "Service List" via electronic transmission (FACSIMILE OR FAX) at the indicated facsimile number(s).

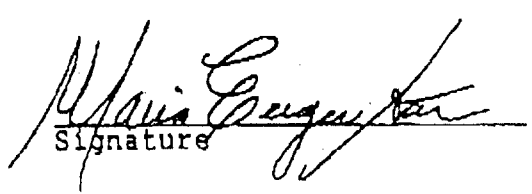
X (BY MAIL) I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary court of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on NOVEMBER 22, 1996 at Santa Monica, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Maria Eugenia Torres
Type or Print Name


Signature

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SERVICE LIST

TCI of EAST SAN FERNANDO VALLEY, L.P.,
a Colorado limited partnership,

v.

OPTEL, INC., a Delaware corporation,
CENTURY QUALITY MANAGEMENT, INC., a California corporation, SAM
MENLO, an individual, doing business as MENLO ENTERPRISES,
and DOES 1 through 50, inclusive,

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, NORTHWEST DISTRICT
CASE NO.: LC 038466

Our File No.: 96-8550

Alexander F. Wiles, Esq.
Craig Varnen, Esq.
IRELL & MANELLA LLP
1800 Avenue of the Stars,
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Facsimile: (213) 896-0400

ATTYS FOR DEFENDANTS,
CENTURY QUALITY MANAGEMENT,
INC. and SAM MENLO, Trustee
of the MENLO TRUST

9000 W. 11th Ave. Suite 3015
Santa Monica, California 90405
(310) 314-8800

